Robert A. Barnes, Inc. *and* General Teamsters Local 174, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 19-CA-15073

5 December 1983

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 8 June 1983 Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel filed an exception to the judge's decision.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exception and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order, as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Robert A. Barnes, Inc., Seattle, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly.

"(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

[1] In view of the nature of his exception, the General Counsel found it unnecessary to file a brief in support thereof.

[2] The General Counsel has excepted only to the judge's inadvertent failure to include in his recommended Order a provision requiring the Respondent to make its payroll and other records available to the Board for inspection to determine what, if any, losses were suffered by the unit employees as a result of the Respondent's unlawful unilateral modification of its collective-bargaining agreement with the Union. We find merit to the General Counsel's exception and shall accordingly modify the judge's recommended Order by including such a provision.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge: Pursuant to notice, a hearing with respect to this matter was held before me in Seattle, Washington, on May 5, 1983. The initial charge was filed on October 13, 1982, by General Teamsters Local 74, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union).

Thereafter, on November 24, 1982, the Regional Director for Region 19 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging a violation by Robert A. Barnes, Inc. (the Respondent) of Section 8(a)(1) and (5) of the National Labor Relations Act.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. The parties elected to waive the filing of briefs, and argued the matter orally at the hearing.

Upon the entire record, and based on my observation of the witnesses and consideration of the arguments presented, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a State of Washington corporation with an office and place of business in Seattle, Washington, where it is engaged in the business of selling sandblasting equipment and abrasives. In the course and conduct of its business operations, the Respondent has gross sales of goods and services valued in excess of $500,000 and annually sells and ships goods or provides services valued in excess of $50,000 directly to customers outside the State of Washington, or to customers within said State who are themselves directly engaged in interstate commerce.

It is admitted, and I find, that the Respondent has been, at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issue*

The principal issue raised by the pleadings is whether the Respondent has violated Section 8(a)(1) and (5) of the Act by unilaterally modifying certain terms and conditions of the collective-bargaining agreement between the parties, at a time when the contract, by its terms, precluded such modifications.

B. *The Facts*

The Respondent and the Union have maintained a collective-bargaining relationship since approximately 1966 covering a unit consisting of its warehouse employees.[1]

[1] The unit is described in the complaint as follows:
Included: All warehousemen employed by the Employer at its 151 South Michigan Street, Seattle, Washington facility.
Excluded: All other employees.

In May 1979, the parties entered into a collective-bargaining agreement containing the following pertinent provision.

The first paragraph of the agreement states that it shall:

> . . . continue in full force and effect through April 30, 1982, and also thereafter, on a year to year basis, by automatic renewal. Provided however, for the purpose of negotiation alterations in wages and other terms and conditions of employment, either party may open this agreement or any contract effectuated through automatic renewal by giving written "Notice of Opening" not later than sixty (60) days prior to the expiration date. "Notice of Opening" is in nowise intended by the parties as a termination of nor shall it in anywise be construed as a termination of this Agreement or any annual contract effectuated through automatic renewal nor as forestalling automatic renewal as herein provided. The parties reserve the right to economic recourse in negotiations, except during the interval between the giving of "Notice of Opening" and the expiration date.

The second paragraph of the agreement states that:

> Except by mutual written agreement, termination of this Agreement or any annual contract effectuated through automatic renewal, must, to the exclusion of all other methods, be perfected by giving written "Notice of Termination" not later than sixty (60) nor more than ninety (90) days prior to the expiration date, whereupon the contract shall, on its expiration date, terminate. Effective termination eliminates automatic renewal.
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> Any "Notice of Opening" or "Notice of Termination" given within sixty days of any expiration date shall be absolutely null and void and completely ineffective for all purposes.

On or about January 6, 1982, the Union notified the Respondent in writing that it was opening the agreement to negotiate changes in wages, hours, and other terms and conditions of employment. The expiration date of the agreement, April 30, 1982, passed without either the Union or the Respondent giving the other a "Notice of Termination," as described above.

Negotiations between the parties commenced on June 10, 1982, and the parties, after several meetings, were unable to reach agreement. Thereafter, by letter dated September 28, 1982, the Respondent notified the Union that it was implementing the terms of its last contract offer which consisted of a reduction in wages from approximately $13.65 to $12.05 per hour, the elimination of three paid holidays, and termination of contributions to health and welfare and pension trusts described in the contract.

C. *Analysis and Conclusions*

The precise contract language involved herein was analyzed in *KCW Furniture Co.*, 247 NLRB 541, 541-542 (1980), enfd. 634 F.2d 436 (9th Cir. 1980). The *KCW* case is identical to the factual situation presented in the instant case, and the General Counsel and counsel for the Union argue that the same finding of a violation is mandated herein. The Board, in the *KCW* case, analyzed the contract provision as follows:

> The contract, by the terms of its duration and renewal clause, automatically renewed itself on a year-by-year basis, unless timely notice of termination was given or the parties mutually agreed in writing to terminate it. In the event a notice of opening is given, however, the contract expressly provides, without qualification, that such notice does not terminate the contract or forestall its automatic renewal. It is evident therefore that the parties intended by the two notice provisions to provide for alternative methods of pursuing negotiations toward a new contract. One of the notices would cause the contract to be renewed, the other would not; and it is obvious that the two provisions were not meant to have the same impact on the existing contract.
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> In the instant case, the parties failed to exercise their option to terminate the contract and instead chose the prescribed course intended to renew the contract during negotiations. . . .
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> . . . .
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> Having found that the contract automatically renewed itself on April 1, we find that Respondent had no right to make unilateral changes in that contract after "impasse" was reached in the bargaining for a new contract. It is well established that an employer is precluded from modifying a contract which is in effect, without consent of the union. Although an employer may unilaterally institute changes when an impasse occurs during the negotiations for an initial bargaining agreement or following the expiration date of an expiring contract, the employer may not do so when, as here, the contract has not terminated. Accordingly, we find that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally instituting terms and conditions of employment inconsistent with the existing collective-bargaining agreement.

The Respondent's counsel herein, William Simmons, argues that the Board in the *KCW* case was wrong in its analysis, as it was not apprised by the parties to that proceeding of certain pertinent evidence. This evidence, according to Simmons, proves that the intent of the contract terms under the "Notice of Opening" alternative which the Union herein elected to exercise on January 6, 1982, permitted the Respondent to make unilateral changes after impasses, despite the fact that the contract had been automatically renewed.

In this regard, Simmons testified that he was personally responsible for the drafting of the language in question when he was a business agent for the Union herein in 1971. The language of the duration and renewal clause, according to Simmons, "from beginning to end is language that [he] drafted," and was first agreed upon

during negotiations between the Union and the "big four timber companies." Thereafter, it was utilized in various contracts in other industries, including the contract in question. The purpose of the provisions, according to Simmons, was to preclude employers from having to discontinue fringe benefit contributions, primarily health and welfare trust payments, on the expiration of a contract and during negotiations for a successor contract. This was accomplished, according to Simmons, by the contract language which continued the contract in existence on a year-to-year basis but simultaneously provided mechanics whereby the parties could negotiate a new agreement without limiting their right to economic recourse. According to Simmons, the terminology "economic recourse" was meant to encompass strikes, lockouts, and specifically the right to make unilateral changes after impasse.

At the time of the aforementioned 1971 negotiation and thereafter, George Cavano was the Union's chief executive officer and principal spokesman. Cavano, who retired from his position in 1975, was called as a witness by the Respondent. He testified that he, rather than Simmons, drafted the language for the cartage agreement in 1973; that the terminology "economic recourse" was first discussed at the bargaining table during those negotiations; and that the language meant that "the union has a right to strike and the employer has a right to lock us out." In a word, Cavano's testimony is diametrically opposed to that of Simmons regarding not only the meaning of the language, but also the author of the language and the particular negotiations which gave rise to it.

From the foregoing, it is clear that the Respondent's evidence regarding the intent of the words "economic recourse" is not only equivocal, it is absolutely contradictory. Moreover, the contract language itself appears to enforce the testimony of Cavano as to the meaning of "economic recourse," since the very essence of the reopening language was for the purpose of causing the contract to remain in effect unless changed through negotiations. It would follow that a strike or lockout would lend substantial impetus to the parties' respective bargaining positions and, unlike unilateral modification, would also permit the contract to remain in effect until changed by negotiated, albeit economically exacted, agreement. This, apparently, is what the parties contemplated. In any event, it would appear that if the original parties to the language, either in 1971 or 1973, intended "economic recourse" to mean the right to make unilateral changes on impasse, they would have said so in order to avoid any ambiguity, particularly as Simmons said this was specifically discussed. Finally, there is no evidence that since 1971 or 1973, depending on whose version is correct, the language which, it may be presumed, has appeared in scores of contracts has ever been so interpreted by any party to it.

The Respondent here is not placed in a dilemma by the aforementioned contractual provisions. It must merely refrain from making unilateral changes until it has given timely "Notice of Termination," as specifically provided by the contract terms. Such a notice precludes automatic renewal, and the ensuing negotiations are thereafter not limited to "economic recourse" but rather the Respondent may then unilaterally implement its contract proposals on impasse in accordance with well-established Board doctrine.[2] See *Midwest Casting Corp.*, 194 NLRB 523 (1971); *R. A. Hatch Co.*, 263 NLRB 1221 (1982).

As argued by the General Counsel and counsel for the Union, I find that this case is explicitly governed by the *KCW* decision, supra. The Board therein clearly determined that, under the language of this agreement, employers may not implement unilateral changes on impasse pursuant to a "Notice of Opening." As this is precisely what the Respondent did, I find that the Respondent has violated Section 8(a)(1) and (5) of the Act, as alleged.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms and conditions of a collective-bargaining agreement.

THE REMEDY

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act, I recommend that it be required to cease and desist therefrom and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Futher, the Respondent shall be required to make whole its employees for the losses they have suffered as a result of the Respondent's unilateral reduction of wages, elimination of three paid holidays, and termination of health and welfare contributions, and continue to pay such payments and benefits until such time as the parties have entered into a new agreement, or reached a bargaining impasse which would permit the Respondent to make unilateral changes in the aforementioned areas. Said backpay will be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[3] Interest, if any, on the pension and health and welfare trust fund contributions, as provided in the terminated collective-bargaining agreement, shall be made in accordance with the criteria set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979). The Respondent shall be required to post the notice attached hereto as an Appendix.

Based on the foregoing findings of fact, conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended

[2] The record shows that on February 7, 1983, the Respondent did submit to the Union a "Notice of Termination" pursuant to the language of the contract and, as a result thereof, the contract has terminated as of April 30, 1983.

[3] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

ORDER[4]

The Respondent, Robert A. Barnes, Inc., Seattle, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to comply with the terms of a collective-bargaining agreement by failing to pay the wages and benefits as provided for therein.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act.

(a) Make whole its employees, and the health and welfare and pension trust funds, for the loss of earnings, holiday pay, or other benefits, with interest, as a result of its unilateral action in the manner prescribed in the section of this decision entitled "The Remedy."

(b) Post at its Seattle, Washington facility copies of the attached notice marked "Appendix."[5] Copies of said notice on forms provided by the Regional Director for Region 19, after being duly signed by the Respondent's representative, shall be posted by it immediately upon receipt and be maintained for 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board gives all employees these rights:

To engage in self-organization

To form, join, or help unions

To bargain collectively through representatives of their own choosing

To act together for other mutual aid or protection

To refrain from any and all of these things except to the extent that members in a union may be required by a legal union-security clause.

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT unilaterally change the wages, holidays, pay provisions, or pension and health and welfare trust fund provisions of a contract with General Teamsters Local 174, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their Section 7 rights.

WE WILL make our employees and the various trust funds whole, with interest where applicable, for the loss of pay and benefits they have suffered.

ROBERT A. BARNES, INC.

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[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."